No. 85-224

In The

Supreme Court of the United States

October Term, 1985

CITY OF RIVERSIDE, et al.,
Petitioners,

vs.

SANTOS RIVERA, et al.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the District Court and the Court of Appeals correctly found — under the Civil Rights Attorney's Fees Awards Act of 1976 and this Court's decision in *Hensley v. Eckerhart* — that respondents' counsel were entitled to fees for all time reasonably expended on this case.

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STATEMENT OF THE CASE

I. INTRODUCTION

This case concerns the reasonableness of an award of fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, to Gerald P. Lopez, who is now a Professor of Law at Stanford Law School,[1] and to Roy B.

[1] Professor Lopez graduated from Harvard Law School in 1974. After clerking in the federal district court, he started his own law practice in San Diego along with Roy B. Cazares and two other attorneys, specializing in civil rights litigaton and the representation of low-income clients. He has taught courses on civil rights litigation, contracts, and other subjects at UCLA and Harvard Law Schools as well as Stanford.

Cazares, who is now a Judge of the San Diego Municipal Court.[2] The judgment awarding fees was initially entered in April 1981 by District Judge Mariana R. Pfaelzer,[3] for services performed by Lopez and Cazares between August 1975 and November 1980 in representing the prevailing plaintiffs (respondents in this Court) in the civil rights action described below. Neither Lopez nor Cazares has yet received any fees for work on the case.

Judge Pfaelzer found that, over the five year period culminating in a nine day jury trial in September 1980, Lopez and Cazares worked a total of 1,946.75 hours on the

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[2] Judge Cazares graduated from Harvard Law School in 1973. After working as a trial attorney in the Defenders' Program of San Diego County for two years, he started his own law practice along with Gerald P. Lopez and two other attorneys. He specialized in civil rights, criminal defense and labor litigation, primarily on behalf of low-income clients.

[3] Prior to her appointment to the federal bench, Judge Pfaelzer practiced law for 20 years with the Los Angeles firm of Wyman, Bautzer, Rothman & Kuchel, where she specialized in business litigation on behalf of such clients as the American Broadcasting Company, American Telephone and Telegraph, Paramount, and Metro-Goldwyn-Mayer. 2 *Los Angeles Daily Journal Judicial Profiles* (unpaginated and undated); *Los Angeles Daily Journal*, Sept. 9, 1980, at 1, col. 3. Judge Pfaelzer was a senior partner with Wyman, Bautzer from 1969 to 1978; she was first nominated to the federal bench in 1975, but declined that nomination due to the recent deaths of two partners in her law firm. 2 *Los Angeles Daily Journal Judicial Profiles*. From 1974 to 1978, she also served as a member of the Los Angeles Police Commission, which is not a civilian review board, but a city agency responsible for the operation and supervision of the Los Angeles Police Department. *Id.* In 1978, Judge Pfaelzer was the president of the Police Commission. *Id.* See also Bicentennial Committee of the Judicial Conference of the United States, *Judges of the United States* 390 (2d ed. 1983).

case. (J.A. 174, 189).[4] Judge Pfaelzer further found that $125 per hour was the prevailing market rate for similar services in the Central District of California. (J.A. 174, 190). Judge Pfaelzer found no facts that would justify a failure to compensate respondents' counsel for the full value of the services they performed in the case. (J.A. 174, 187-90). Petitioners and amici, including the Solicitor General,[5] do not challenge these findings of fact as clearly erroneous. See Rule 52(a), Fed. R. Civ. P. Rather,

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[4] "J.A." refers to the joint appendix filed in this Court. Other abbreviations used in this brief are as follows: "P.Br." refers to the brief for petitioners; "S.G.Br." refers to the brief *amicus curiae* filed by the Solicitor General of the United States; "Bliley Br." refers to the brief *amicus curiae* filed by Congressman Thomas J. Bliley, Jr., et al; "EEAC Br." refers to the brief *amicus curiae* filed by the Equal Employment Advisory Council.

[5] The views expressed in the brief filed by the Solicitor General are contrary to the views of the United States Equal Employment Opportunity Commission. The Commission, which has been granted the lead role among federal agencies in enforcing Title VII and other employment discrimination statutes (see Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1970), 92 Stat. 3781; Executive Order No. 12067, 3 C.F.R. 206 (1978)), reviewed the present case and unanimously concluded that "a rule restricting the award of attorney's fees solely because the dollar amount of damages is low could result in less than full relief for identified individual victims of discrimination who successfully bring suit . . . [and] would also discourage private attorneys from taking Title VII cases which involve only individual claims." *EEOC Memorandum to Solicitor General Charles Fried* at 1 (Nov. 18, 1985), published in *BNA Daily Labor Report*, Jan. 9, 1986, at E-1. The Solicitor General rejected the Commission's recommendation that he file a brief supporting affirmance and instead filed a brief urging reversal of the judgment below and imposition of a proportionality requirement. See *BNA Daily Labor Report*, "Justice Department Rejects EEOC Advice, Seeks Limit on Lawyer Fees in Rights Cases," Jan. 9, 1986, at A-1. Cf. *Williams v. City of New Orleans*, 729 F.2d 1554, 1572 n.5 (5th Cir. 1984) (en banc) (Wisdom, J., concurring in part and dissenting in part). Respondents have been advised that the Commission's Memorandum to the Solicitor General is being reproduced as an appendix to the brief *amicus curiae* of the NAACP Legal Defense and Educational Fund, Inc.

they contend that the award was not "reasonable" within the meaning of § 1988 and that Judge Pfaelzer abused her discretion because, in their view, the award was not sufficiently proportional to the monetary damages obtained by respondents. See, e.g., P.Br. at 5-8.

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II. STATEMENT OF FACTS

Judge Pfaelzer's award of fees was informed by, and should be reviewed with, an understanding of the underlying facts in this case, including the facts presented at the trial over which she presided. See *Anderson v. City of Bessemer City*, 105 S. Ct. 1504 (1985). Those facts are summarized below.[6]

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[6] The testimony that was presented at the trial of this case has never been transcribed. Defendants did not appeal the underlying judgments for plaintiffs on the merits, but challenged only the award of attorney's fees to plaintiffs' counsel. Defendants did not, to our knowledge, request a trial transcript for the purposes of their appeal. To avoid incurring unnecessary expense and transforming the fee request into "a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), plaintiffs likewise did not request a trial transcript. Accordingly, the facts set forth in this brief, unless otherwise identified, are based on documents in the joint appendix ("J.A.") or in the record before the District Court. The latter documents are identified in this brief as follows: depositions ("Dep. of") are identified by the name of the deponent, page numbers and date; police reports ("Police R."), obtained from defendants through discovery requests, are identified by the name of the author and the title of the document; written reports of police radio recordings ("Radio R.") and cassette tapes of police radio recordings ("C.T. Radio R."), also obtained from defendants through discovery requests, are identified by time and speaker.

A. The Events of August 1, 1975

On the evening of August 1, 1975, Santos and Jennie Rivera gave a party at their home on Lincoln Avenue in Riverside, California.[7] Before that night, no one in the Rivera family had ever been arrested. The Riveras and their approximately fifty guests had no warning that evening of possible trouble; "[t]he party was not creating a disturbance in the community. . . ." (Findings of Fact and Conclusions of Law, J.A. 188).

On that same evening, Riverside police officers Linford Richardson and Gerald Miller were involved in an investigation geographically near, but unrelated to, the party at the Rivera home. At 11:18 PM Richardson broadcast over his car radio that he and Miller were then chasing two juvenile pedestrians suspected of having discarded a paper cup partially filled with beer. (See "Radio Recordings of August 1 Incident" ("Radio R.");[8] Richardson's Police Report ("Police R.")). At

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[7] Plaintiffs Santos and Jennie Rivera lived at the Lincoln Avenue residence with their 11-year old son, plaintiff Donald Rivera. Plaintiffs Jerome Rivera, Lee Roy Rivera, and 13-year old Mark Larabee (who at the time of the party was visiting from his family home in Arizona) are nephews of Santos and Jennie Rivera. Plaintiffs Enrique Flores and Manuel Flores, Jr. are brothers-in-law of Jerome Rivera and friends of Santos and Jennie Rivera.

[8] "Radio Recordings of August 1 Incident" is a written report dated November 13, 1975, and prepared by two officers of the Riverside Police Department for the use of Deputy District Attorney Edward Daniel Webster in the criminal prosecution of plaintiffs and other guests at the Rivera home. This report does not purport to be a verbatim transcript of the recorded radio traffic relevant to the events at the Rivera home on August 1, but rather "reflects the meaning of conversations" actually recorded on cassette tapes which were also delivered to Webster. (Radio R.).

11:19 Richardson radioed that, while chasing one of the minors on foot, he noticed what he described as a "fairly large party." (Radio R.). Although he reported that he expected no problem at the scene of the chase, he nevertheless directed backup units to "go by the party," and to "make sure all your equipment is with you. Helmets and sticks."[9]

A surveillance helicopter and backup units soon arrived.[10] Though Richardson and Miller were then almost a block west of the Rivera home, one police unit parked directly in front of the Rivera residence. The officers in this unit, defendant Peters and another officer, got out of the unit, drew their weapons and started waving them toward the Rivera residence. (Dep. of Lee Roy Rivera at 5 (Dec. 16, 1976)).

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[9] The quotation of defendant Richardson's broadcast in the text is taken from the police cassette tapes ("C.T. Radio R."). By contrast, the written report of the radio recording states only that defendant Richardson "directs that the back-ups continue to respond." (Radio R.).

[10] At about this time, plaintiff Jennie Rivera called the police station to ask why a police helicopter was hovering over her home and shining its lights into her yard. Told that officers were chasing two minors, she informed the police dispatcher that the only two minors at the party, her son and nephew, were both asleep. (See Deposition of ("Dep. of") Jennie Rivera at 13, 17 (Dec. 16, 1976)). The dispatcher so advised defendant Richardson, who was asked if he wanted to speak to the woman. He radioed: "Negative. We don't have anything to say to those people . . . I don't see where we have anything to tell the lady. If they don't keep the kids from drinking and keep them off the street, there's gonna be trouble." (C.T. Radio R.). In fact, the fleeing minors had not been at the party, nor did they hide there when chased by defendants Miller and Richardson. (See Dep. of Jerome Rivera at 5, 19 (Dec. 16, 1976); Dep. of Lee Roy Rivera at 17 (Dec. 16, 1976)).

Meanwhile, a second unrelated incident was developing nearly a block west of the Rivera home. In the course of defendant Richardson's struggle with two persons just cited for having an open container of beer in a pickup truck, defendant Miller radioed an "1199" ("Officer needs help!"), a radio call which by convention immediately leads to, and in this instance in fact resulted in, a massive police response. Some units responding to Miller's call, however, went not to Richardson's and Miller's location but to the Rivera home, where Peters and his partner were standing outside their unit waving their weapons.

The commotion and fear generated by the police helicopter's searchlight surveillance, the numerous police units now arriving all along Lincoln Avenue, and particularly the two officers brandishing their weapons directly in front of the Rivera home prompted plaintiff Jerome Rivera and a friend to leave the party and to approach the police officers to ask whether they could help in any way. (See Dep. of Jerome Rivera at 6-7 (Dec. 16, 1976)). However, when Rivera walked up to defendant Miller and offered to help, Miller responded with belligerent vulgarities. (*Id.* at 7). Rivera then asked Miller for his name and badge number, which Miller refused to provide. (*Id.* at 8). When Rivera leaned over to look at Miller's badge number, Miller poked Rivera with his nightstick. Rivera then backed up and turned around to walk back to the party, at which point defendant Plait hit Rivera on the back of the head with a nightstick, lacerating his scalp. (*Id.* at 8-9).

The situation rapidly deteriorated as units, sirens screaming and red lights flashing, continued to converge

without supervision or instructions. According to the defendants, both those police officers who then were arriving in response to the "1199" and those already on the scene were being subjected to an unrelenting "barrage" of dirt clods, rocks, bottles, cans and sticks. (See, e.g., Watts' Supp. Police R. at 1). However, no officer (except for Richardson) ever claimed that he had been struck by a projectile. Moreover, the police did not gather a single projectile as evidence, even though later they charged some of the plaintiffs with assault with a deadly weapon. (See, e.g., Dep. of M. Watts at 15 (Jan. 12, 1977)).

Finally, the only witness who was not directly involved in the police action on Lincoln Avenue that evening, John Hocking, offered an account in conflict with the police officers' story. Mr. Hocking then lived at 7003 Lincoln Avenue and, among other holdings in the City of Riverside, owned the orange groves that surrounded the Rivera residence. Drawn outside by the arrival of the police units, Mr. Hocking witnessed what happened from the time of the "1199" call to the final departure of the police hours later. Mr. Hocking saw no crowd from the Rivera home threatening police officers; he saw not a single item thrown; and he saw no one attempt to strike a police officer. What Mr. Hocking did see on the night of August 1 was undisciplined violence by police officers against civilians: police officers beating two Chicano youths and kicking an elderly Mexican-American woman in the stomach.[11]

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[11] Concerned by police reports that crowds had invaded his orange groves, Mr. Hocking went at dawn on August 2 to in-

(Continued on following page)

Guests standing in the driveway watching a bleeding Jerome Rivera walk back to the house were ordered by defendant Peters either to get back into the house or to leave. (Dep. of Lee Roy Rivera at 9-11 (Dec. 16, 1976)). Some guests, attempting to comply with the order by leaving, were seized, struck, choked, arrested, searched, subjected to ethnic slurs and maced. (*Id.* at 10, 14, 21). Other guests returned to the house, only to have defendant Watts, who commanded the operation at the Rivera residence, throw tear gas grenades at and into the home. (Dep. of Jennie Rivera at 6, 16 (Dec. 16, 1976)).

Once they were forced outside by the tear gas and police, the Riveras and their guests were made to run a gauntlet of Riverside police officers who, without provocation, prodded, shoved and beat them with nightsticks, and then handcuffed them and dragged them across the street. (*Id.* at 10). With the help of other police officers, defendant Miller then used a grease pencil to write the number "409" in large script on the foreheads of those arrested. (Watts' Supp. Police R. at 2). "409" is the California Penal Code number for the charge of failing to disperse. As they were paraded before their neighbors, handcuffed and humiliated, plaintiffs and other guests could hear defendant Olsen singing over the police helicopter's broadcast system, "The party's over. It's time to call it a day." (Dep. of J. Olsen at 41 (Aug. 29, 1978)).

(Continued from previous page)

spect his irrigation system for damage. He found no damage and not even any footprints in his recently irrigated grove. He also inspected the asphalt roadway between the Rivera home and his own for any trace of the projectiles supposedly thrown at the officers the night before. He found none.

B. The Cover-Up

Riverside police officers and city officials immediately began to cover up the police violence and misconduct that had taken place at the Rivera home. In the early morning hours of August 2, defendants and other Riverside police officers met at the police station to collaborate in the drafting of false, evasive and incomplete police reports.[12] In his supplementary report of August 2, for example, defendant Peters reported that he drew and waved his weapon only "after observing that the subjects had already assaulted Uniformed Police Officers." (Peters' Supplementary Police R. at 1). At trial Peters admitted that this report was false.[13]

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[12] Defendant Richardson maintained that the report writing system used by the City of Riverside "eliminated conflicting statements that tend to enter into reports when being independently written, by forcing the officers involved to corroborate [*sic*] in preparing a single report." (Richardson's Shift Activity Report at 3).

[13] As noted above, there is no trial transcript in this case. However, the exchange in which Peters made this admission was reported in *The Press*, a Riverside newspaper covering the civil rights trial:

> "Peters testified that he had not actually 'observed subjects already assaulting (a) uniformed police officer' as he wrote he had in an arrest report.
>
> " 'This is a flat lie in your report, isn't it?' said plaintiffs' attorney Roy B. Cazares, of San Diego.
>
> " 'No, it is not,' said Peters. He said, based on past 'personal experience' in Casa Blanca and police problems there, he 'assumed' an attack on then Sgt. Linford Richardson had occurred after he saw a dozen people coming toward him from what he thought was Richardson's location.
>
> "Judge Pfaelzer asked Peters if he had seen an assault on Richardson.
>
> " 'I did not see the uniformed officer,' he said.
>
> " 'That is not the question,' said the judge.
>
> " 'No,' answered Peters. . . ." *The Press*, Sept. 24, 1980, § B, at 3.

On August 3 a police investigating officer, who had been assigned the task of deciding whether to ask the District Attorney to bring charges against those arrested at the party, read police reports, spoke to some arresting officers, and asked defendants Watts and Richardson to prepare supplemental reports. (See Dep. of M. Smith at 7-8, 10-11 (Dec. 12, 1978)). Without further investigation, he requested on behalf of the City that the District Attorney file particular charges against those arrested. (*Id.* at 14).

On August 4, before an internal investigation of the incident had been completed, the Chief of Police reported to the City Manager and City Council, praising the quality of police work in the mass arrests at the Rivera home. (See Ferguson Report to Daniel E. Stone, City Manager, on Police Activity Lincoln and Mary ("Ferguson R.")). For this report, the Police Chief did not interview the Riveras, John Hocking, or any other civilians about what they had experienced or seen, but relied exclusively on police officers' accounts.

The Deputy District Attorney whose job it was to file criminal complaints apparently recognized that the police reports failed to support either the arrests made or the charges recommended by the investigating officer. (See Dep. of M. Smith at 14; Dep. of D. Innskeep at 6-7 (Dec. 12, 1978)). The investigating officer, however, continued to urge that criminal complaints be filed (see Dep. of M. Smith at 12 (Dec. 12, 1978); Dep. of E. Webster at 6 (Dec. 12, 1978)), although he later admitted that at these early meetings he may have opposed dismissals of the charges out of concern for the City's potential civil liability. (See Dep. of M. Smith at 17 (Dec. 12, 1978)).

In response to pressure from the Chicano community following the events at the Rivera home, the City established a 15 member committee to investigate the tensions between the people of Casa Blanca, the Chicano barrio near the Riveras' home, and the Riverside Police Department. (See Final Report to City Council by Ad Hoc Committee on Casa Blanca ("Final Report") (Feb. 9, 1976)). Five months and 19 public meetings later, the committee issued a majority report confirming what Chicanos in Riverside had long known: that they were often treated unfairly and with hostility in their hometown, while city officials and employees consistently pursued and defended anti-Chicano policies and customs. (*Id.* at 83-85). The report acknowledged the historical mistreatment of Chicanos by Riverside police officers, and it urged considerable changes in the structure of the police department and in the hiring, training and supervision of the police officers who regularly worked in Chicano neighborhoods. (*Id.* at 1-26). The City Council, after receiving the committee's report, nevertheless chose to affirm its existing policies and customs.

The official cover-up continued with the prosecution of those plaintiffs who had been charged with criminal offenses.[14] In October 1975, shortly before the criminal trial of the plaintiffs was set to begin, the Deputy District Attorney conducted a reenactment of the events at the

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[14] After the August 1 incident, police officers also harrassed some plaintiffs. For example, Jennie Rivera received threatening phone calls, was subjected to helicopter surveillance over her home, and saw police officers staking out her home, "flipping off" (extending the midde finger of the hand to) her son, and "sticking out their tongues like babies" as they left. (See, e.g., Dep. of Jennie Rivera at 24-26 (Dec. 16, 1976)).

Rivera home with defendants and other officers (see Dep. of E. Webster at 6, 7, 12, 18, 19, 22 (Dec. 12, 1978)), and, as a result, concluded that the police reports describing crimes allegedly committed by Jerome and Lee Roy Rivera could not be correct. (*Id.* at 19, 20).

But to protect the City and individual defendants from civil liability, the Deputy District Attorney invoked a city policy established for these circumstances. (Dep. of D. Innskeep at 13, 16 (Dec. 12, 1978)). He offered to dismiss the criminal complaints in exchange for Jerome and Lee Roy Riveras' stipulation that there was probable cause for their arrest. (Dep. of E. Webster at 15 (Dec. 12, 1978)). Advised by their attorneys that admitting to probable cause would damn later efforts to hold defendants responsible for unconstitutional acts and policies, Jerome and Lee Roy Rivera refused the offer and prepared to be tried. Inevitably, however, the illegitimacy of the prosecution led to dismissal of these two cases as well as those of the other plaintiffs arrested at the party. (See J.A. 188).

C. Litigating the Case

In this environment of official concealment and hostility, plaintiffs had great difficulty finding an attorney who would take action against the City. For weeks plaintiffs searched for a local attorney who would represent a politically unpopular position, on behalf of people without the money to finance major litigation,[15] in a case that

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[15] The occupations of the adult plaintiffs were custodian, sales clerk, gas station operator, correctional officer, accountant, and custodian/student. Two others were youngsters 11 and 13 years old.

was obviously complicated, likely to be lengthy and unlikely to succeed. Finally, through their U.S. Representative's office, they were referred to Roy Cazares and Gerald Lopez, who were then attorneys in a small, newly formed law firm in San Diego, some 120 minutes by car and 100 miles southwest of Riverside. On August 21, 1975, Cazares and an investigator drove to Riverside to interview the Riveras and other witnesses to the events of August 1. (See J.A. 44).

Cazares and Lopez eventually agreed to represent the Riveras, even though they knew that the case would be time-consuming and difficult, and that the outcome was uncertain. Details of the continuing official misconduct were sketchy, confused and almost exclusively within the knowledge of police officers and other city officials who were covering up the wrongdoing. Defendants had every reason to withhold this information from plaintiffs, who could not even tell their attorneys which police officers were responsible for what actions; tear gas and police gas masks made identification of many individual officers impossible.

Like the facts, existing law governing the § 1983 lawsuit was murky. In those days before *Monell v. Department of Social Services*, 436 U.S. 658 (1978), civil rights counsel had to rely on alternative theories of liability to avoid the Court's mistaken ban on § 1983 claims against local governments. See *Monroe v. Pape*, 365 U.S. 167 (1961). Pursuing § 1983 claims against individual police officers presented equally complex and unsettled legal issues: What was the requisite state of mind to establish a cause of action? How was the causation language of

§ 1983 to be interpreted, particularly in claims against supervising officials? These factual and legal problems were exacerbated by the distance between San Diego and Riverside, which made communication and investigation even more difficult and time-consuming. (J.A. 41). And, as described above, defendants and other city officials persisted in their efforts to conceal their constitutional wrongdoing.

Despite investigative efforts that had begun in August 1975 and stretched through May 1976, details of the events of August 1 and their aftermath remained unknown and unlearnable. Under these circumstances, plaintiffs filed an action in federal district court[16] on June 4, 1976, stating civil rights and pendent state tort claims against the City of Riverside, the Chief of Police and 30 individual police officers.[17] The District Court found that the factual

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[16] The case was initially assigned to District Judge Warren J. Ferguson, but in November 1978 was transferred to District Judge Pfaelzer, who has presided over all subsequent proceedings in the District Court, including the trial on the merits and all attorney's fee litigation.

[17] Petitioners incorrectly assert that plaintiffs brought 256 claims against them. (See P.Br. at 3). The complaint filed in June 1976 stated seven causes of action, encompassing claims alleged under 42 U.S.C. §§ 1981, 1983, 1985 and 1986 and for false arrest/imprisonment, malicious prosecution and negligence. See Ninth Circuit Excerpts of Record at 12-25. By September 1980, when the case was tried, changes in § 1983 law had rendered the civil rights claims grounded in §§ 1981, 1985 and 1986, as well as the state claim for malicious prosecution, substantially replicative of the § 1983 claims. Plaintiffs therefore abandoned these claims before trial. Only the § 1983 and state pendent claims for false arrest/imprisonment and negligence ultimately were tried to the jury, although the underlying substantive claims asserted through § 1983 included Fourteenth, Fourth and Fifth Amendment deprivations.

and legal uncertainties and complexities made it "reasonable for plaintiffs initially to name thirty-one individual[s] . . . as well as the City of Riverside as defendants in this action." even though claims against 17 individual officers were later dismissed on motions for summary judgment. (J.A. 188).[18]

After four years of discovery and two settlement conferences,[19] a nine day trial ensued on the § 1983 (Fourteenth, Fourth and Fifth Amendment) claims[20] and the

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[18] Those police officers who were dismissed from the suit on motions for summary judgment filed a malicious prosecution complaint in the Riverside Superior Court against both the plaintiffs and their attorneys. This suit resulted in a series of related proceedings, including an appeal of the suit's dismissal to the Ninth Circuit, and it remained alive until the District Court denied defendants' request for attorney's fees under § 1988 on the ground that plaintiffs' claims against those defendants were not vexatious, frivolous, or brought to harass or embarrass the defendants. (See J.A. 186; *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)).

[19] Judge Pfaelzer ordered and personally presided over both conferences. After being urged by the District Court to reconsider the substantial risk of liability at trial, defendants' counsel made a final offer of $10,000 in satisfaction of all plaintiffs' claims, attorney's fees and costs. (J.A. 188, 226-27).

[20] In his in chambers opinion, Justice Rehnquist incorrectly reports that, prior to trial, plaintiffs dropped their original allegations that the police officers had acted with discriminatory intent. (See *City of Riverside v. Rivera*, 106 S. Ct. 5, 6 (1985); see also P.Br. at 3). In fact, plaintiffs never dropped their claim that defendants had violated their equal protection rights under the Fourteenth Amendment, a claim that requires proof of discriminatory intent under *Washington v. Davis*, 426 U.S. 229 (1976). The jury's § 1983 verdicts in favor of all plaintiffs and against the city and individual defendants encompassed this underlying equal protection claim. Moreover, the District Court's Findings of Fact and Conclusions of Law describe defendants' unconstitutional acts as intentional and "motivated by a general hostility to the Chicano community. . ." (J.A. 189-90).

state pendent claims. The jury, after seven days of deliberation, found in favor of all eight plaintiffs and against the City of Riverside and five individual officers on § 1983 claims for Fourteenth, Fourth and Fifth Amendment deprivations, and on state claims for negligence and false arrest/imprisonment. The jury awarded total damages of $33,350.[21]

D. Litigating the Fees

On December 1, 1980, plaintiffs moved for reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988. In April 1981, the District Court awarded plaintiffs $245,456.25 in attorney's fees on the basis of written Findings of Fact and Conclusions of Law. (J.A. 171-75). In making this award, the District Court refused to apply the multiplier requested by plaintiffs, and it reduced plaintiffs' request by those costs it found to be beyond the intended scope of § 1988.

Defendants appealed, and the Ninth Circuit affirmed the District Court's award as reasonable. *Rivera v. City*

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[21] Justice Rehnquist's in chambers opinion (106 S. Ct. at 6) and petitioners' brief (P.Br. at 3, 16) erroneously state that plaintiffs dropped their requests for injunctive and declaratory relief prior to trial. They did not; in fact, it was impossible for plaintiffs to determine whether to pursue such relief until after trial. (See Ninth Circuit Excerpts of Record at 122; J.A. 214, 219). After trial, plaintiffs' counsel advised the District Court that they had decided not to pursue such relief because enjoining defendants to "obey the law . . . including the Constitution" seemed too broad and imprudent. Cf. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). The District Court nonetheless observed that, "if you [plaintiffs] had asked for it against some of the officers I think I would have granted it. . . . I would agree with you that there is a problem about telling the officers that they have to obey the law. But if you want to know what the Court thought about some of the behavior, it was — it would have warranted an injunction." (J.A. 219).

of Riverside, 679 F.2d 795 (9th Cir. 1982) (J.A. 176-83). Defendants filed their first petition for certiorari in January 1983. In May 1983, this Court granted the writ and remanded this case and every similar case on its docket for reconsideration in light of its recent decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). See 461 U.S. at 951-52 (1983).

Plaintiffs' request for reasonable attorney's fees and costs was then reconsidered by District Judge Pfaelzer over a period of 12 months, during which two hearings were held. (J.A. 224, 232-42). On July 26, 1984, Judge Pfaelzer issued comprehensive Findings of Fact and Conclusions of Law, awarding attorney's fees in the amount of $245,456.25, (J.A. 187-92), but again refusing to apply the multiplier requested and reducing the award by those costs that she found to be not contemplated by the statute. Judge Pfaelzer subsequently denied plaintiffs' motion requesting an increase in the appeal bond posted by defendants. (See Reporter's Transcript of Proceedings, at 4 (Nov. 16, 1984)).

Defendants appealed once again, and the Court of Appeals concluded that the District Court had carefully examined the record and had correctly applied the *Hensley* criteria in determining a reasonable fee in this case. (J.A. 197). The Ninth Circuit denied, but Justice Rehnquist subsequently granted, a stay of the Ninth Circuit's mandate pending disposition of the present petition for certiorari, which this Court granted on October 21, 1985.

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SUMMARY OF ARGUMENT

Petitioners and amici urge the Court to substitute mechanical proportionality for *Hensley's* contextualized approach to the award of fees under § 1988. They would have the Court believe that excessive civil rights litigation under § 1983, encouraged by exorbitant fee awards under § 1988 to rapacious plaintiffs' attorneys, threatens to ruin federal courts and to bankrupt local governments. However, this image of civil rights litigation — and of the lawyers who represent plaintiffs in such litigation — does not comport with the facts established by empirical evidence. The reality is that § 1983 cases account for only a small fraction of the cases filed in the federal courts each year; that they do not differ significantly from non-civil rights cases in either the percentage of cases going to trial or the median time for disposition; that plaintiffs in such cases are substantially less likely to obtain any relief than plaintiffs in non-civil rights cases; that the few cases in which plaintiffs receive a remedy through either settlement or trial typically involve relatively minor amounts of both damages and counsel fees; and that the fiscal problems confronting local governments, while sometimes serious, are virtually never related to § 1983 litigation or to § 1988 attorneys' fees.

The legislative history of § 1988 demonstrates congressional recognition, in the wake of this Court's *Alyeska* decision, that victims of civil rights violations did not have effective access to the judicial process: government lawyers were not available to represent such victims (indeed, they usually represented the opposition); these victims could not afford to purchase legal services at the hourly

rates set by the private market; and the contingent fee arrangements that made legal services available to victims of personal injuries did not work for victims of constitutional violations, whose cases were complex, unlikely to be successful and, even if successful, likely to produce only small monetary recoveries.

Congress therefore enacted § 1988 to effectuate civil rights laws by assuring that private lawyers would be compensated for the substantial expenditures of time and effort necessary to represent plaintiffs effectively in actions brought to enforce those laws. Fully aware that such representation was difficult and time-consuming, and that the damage remedies available to plaintiffs as a result of such representation were often limited and sometimes nonexistent, Congress nonetheless decided that counsel for prevailing plaintiffs should be compensated for all time they reasonably expended on a case. In making this determination, Congress examined data showing that counsel fee awards made under comparable fee-shifting statutes in antitrust cases varied widely in relation to the damages recovered by plaintiffs in such cases. The fees awarded to plaintiffs' counsel in some antitrust cases were many times greater than the damages recovered by the plaintiffs. Against this background, Congress concluded that "the amount of fees awarded under [§ 1988 should] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases[,] and not be reduced because the rights involved might be nonpecuniary in nature." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976).

Congress thus recognized that it would be appropriate and even necessary in some cases to award fees to plaintiffs' counsel under § 1988 that were disproportionate to the amount of damages recovered by plaintiffs under § 1983. The record here demonstrates that this is such a case. The Court in *Hensley* adopted guidelines for calculating reasonable fees that are in accord with the intent of Congress, and the courts below correctly applied these guidelines in awarding and affirming the fee in the present case. These guidelines, in conjunction with other safeguards, more than adequately protect defendants against awards of unreasonably large counsel fees in civil rights cases.

ARGUMENT

Only three years ago this Court in *Hensley* took the "opportunity to clarify the proper relationship of the results obtained to an award of attorney's fees" under § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 432 (1983). The Court rejected a mechanical proportionality approach to the award of fees—either between issues raised and issues prevailed upon or between relief sought and relief obtained—and instead adopted the more contextualized approach expressly preferred by Congress. *Id.* at 434-37 & n.11; *Blum v. Stenson*, 104 S. Ct. 1541, 1546 (1984). Petitioners and amici now urge that the fee awards under § 1988 must be mechanically proportional to damages awarded in civil rights actions and thus, in effect, overrule *Hensley*.

In advocating this approach, petitioners and amici understandably downplay the legislative history and rely instead on a concern for the destructive impact of § 1983 litigation on the judiciary, local governments and officials and taxpayers. Because the impact of § 1983 litigation thus provides important background for the resolution of the question before this Court, the arguments in this brief will be presented in an unusual order. Respondents first will examine the reality behind the presumed destructiveness of these civil rights cases. Then respondents will demonstrate that in *Hensley*, contrary to petitioners' and amici's arguments, this Court was correct in its reading of § 1988's legislative history and in its determination of the guidelines for awarding reasonable—and not excessive or inadequate—attorney's fees. Finally, respondents will show that the District Court and the Court of Appeals properly applied the *Hensley* guidelines in this case.

I. THE CONSTRUCTION OF § 1988 URGED BY PETITIONERS AND AMICI IS BASED ON UNSUPPORTED AND ERRONEOUS ASSUMPTIONS ABOUT THE NATURE OF § 1983 LITIGATION IN THE FEDERAL COURTS

The concern that § 1983 litigation is destructive rests on three overlapping and reinforcing assumptions about its impact. First, many assume that an excessive number of § 1983 cases is now before the federal district courts. Second, most presume this number of cases unduly burdens courts and defendants. Finally, many attribute the perceived "liability crisis" confronting local governments to routinely huge § 1983 damage awards and § 1988 fee awards.

An examination of available research, however, exposes the error of each of these assumptions. This re-

search includes empirical studies of § 1983 litigation that focus on the Central District of California where this case was brought.[22] These § 1983 studies draw support from recently completed empirical projects on a wide range of civil litigation in this country.[23] These projects conclude not only that we are not nearly so litigious (either in absolute or relative terms) as popular descriptions bemoan, but that we are least likely to sue when pressing discrimination claims against governments. Finally, both a federal study and other reports conclude that fiscal problems confronting local governments, while sometimes serious, are almost never catastrophic and almost entirely unrelated to § 1983 litigation.[24]

The empirical studies are revealing in two respects. First, they point out the deficiencies in the statistics published by the Administrative Office of the U.S. Courts,

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[22] Eisenberg & Schwab, *The Realities of Constitutional Tort Litigation ("Realities")* (1986) (study presented at the Association of American Law Schools 1986 Annual Conference); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study ("Section 1983")*, 67 Cornell L. Rev. 482 (1982). A copy of *Realities* is being lodged with the Clerk of the Court and a copy provided to petitioners.

[23] D. Trubek et al., *Civil Litigation Research Project Final Report ("Civil Litigation")* (1983); Galanter, *Reading The Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society ("Landscape of Disputes")*, 31 UCLA L. Rev. 4 (1983); Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture ("Adversary Culture")*, 15 Law & Society Rev. 525 (1980-81).

[24] Advisory Commission on Intergovernmental Relations, *Bankruptcies, Defaults, and Other Local Government Financial Emergencies ("Local Government Financial Emergencies")* (1985); see also *N. Y. Times*, May 12, 1985, at 1.

the source of nearly all previous data about the volume of § 1983 cases. A major problem with these statistics is how cases are classified. While the Administrative Office data lump all "civil rights" cases together, empirical studies conclude that only about one-third of these cases are § 1983 cases.[25] The difference is significant in understanding the impact of § 1983 litigation. For example, the Administrative Office data show 441 nonprisoner civil rights cases filed in the Central District for the 1980-81 fiscal year.[26] By contrast, the Central District's court records and pleadings reveal 144 nonprisoner § 1983 cases[27] filed in that fiscal year.[28]

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[25] The earlier of the two § 1983 studies concludes that § 1983 cases "constitute only about one-third, and certainly not more than one-half, of the cases the Administrative Office classifies as civil rights cases." *Section 1983* at 533. The later study concludes that only about one-third of the Administrative Office "civil rights" cases are § 1983 cases. *Realities* at 12.

[26] *Realities* at 12.

[27] The special nature of prisoner § 1983 cases justifies the treatment they typically receive as a special category. See, e.g., Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts ("When Prisoners Sue")*, 92 Harv. L. Rev. 610 (1979). Nonetheless, data concerning prisoner § 1983 cases from the empirical studies of the Central District reveal patterns similar to those for nonprisoner § 1983 cases, and may be reviewed both in the Appendix to this brief and in *Section 1983* and *Realities*.

[28] *Realities* at 12-13. If one includes employment discrimination claims brought under both Title VII and § 1983, approximately 178 cases may be classified as § 1983 cases. *Id.* at 13. Of the 144 non-Title VII § 1983 cases, seven involved transparently erroneous reliance upon § 1983, leaving 137 "true" § 1983 cases. *Id.* For a similar contrast between the Administrative Office data and the number of nonprisoner § 1983 cases actually filed in the Central District for the years 1975 and 1976, see

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In addition to rejecting the indiscriminate use of the Administrative Office statistics as "a measure of the number of, or long-term growth of, section 1983 cases,"[29] these studies indicate that § 1983 cases burden courts and defendants significantly less than do other classes of cases. For example, in fiscal year 1980-81, there were 6.4 non-civil rights tort cases and 2.1 copyright, patent and trademark suits filed in the Central District for every § 1983 case filed.[30]

A closer look at the impact of § 1983 cases on the judiciary also undermines the statute's reputation for overwhelming judges. For example, for the fiscal year 1980-81 there were 10.6 nonprisoner § 1983 filings per judgeship.[31] During the five years between the two studies of the Central District, § 1983 cases actually decreased as a percentage of the Central District's total civil docket (from 5.56% in the years 1975-1976 to 3.8% for the fiscal year 1980-81) — a particularly noteworthy development since the Civil Rights Attorney's Fees Awards Act was approved on October 19, 1976.[32]

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Section 1983 at 526, 550 & 551. It is also noteworthy that the number of nonprisoner § 1983 cases filed in the Central District in fiscal 1980-81 increased only eight from 1976 and four from 1975. See *id.* and *Realities* at 12-13.

[29] *Section 1983* at 536. See also *Realities* at 12.

[30] *Realities* at 13-14, 17 & Table IV; Administrative Office of the United States Courts, *Management Statistics for the United States Courts 1982* at 105.

[31] *Realities* at 16. For data revealing similar patterns for the calendar years 1975 and 1976, see *Section 1983* at 531. See also Table I, Appendix to this brief.

[32] *Id.* at 19.

Even the total number of § 1983 cases actually filed overstates the burden on courts and defendants. While there is no standard method for measuring the workload generated by a particular group of cases, relevant information includes the number of answers filed, the number of hearings before the court, the amount of "paper pushed" (interrogatories and depositions), and the median time to disposition. Out of 178 § 1983 cases filed in fiscal year 1980-81,[33] answers were filed in 115;[34] hearings were held in 101;[35] depositions were taken in 101 and interrogatories were served in 57.[36] The median disposition time for § 1983 cases in 1980-81 was 11.57 months.

The number of trials and the number of dismissals for lack of prosecution corroborate these data. In 1976, about seven percent of § 1983 cases filed in the Central District resulted in trial; and in fiscal 1980-81, about ten percent resulted in trial.[37] Twelve percent of the nonprisoner § 1983 cases filed in the Central District in 1976 were dismissed for lack of prosecution.[38] By comparison, trials occurred in about 48% of all cases filed in fiscal year 1976 in California's superior courts, the principal state courts

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[33] The total of 178 cases for fiscal year 1980-81 includes those cases combining Title VII and § 1983 claims. Comparable data for 1975 and 1976 are reported in Table II, Appendix to this brief.

[34] *Realities* at Table III.

[35] *Id.*

[36] *Id.*

[37] *Section 1983* at 526; *Realities* at Table II. See also Table II, Appendix to this brief.

[38] *Section 1983* at 532.

of general jurisdiction.[39] And in fiscal year 1976, cases dismissed for lack of prosecution comprised less than 1.5% of the civil cases filed in California's superior courts.[40]

These findings, together with the only other similar studies undertaken,[41] shatter the image of courts clogged with § 1983 cases. In fact, other studies suggest that claims central to § 1983's historical purpose are litigated not too much, but too little: less well-educated people tend not to perceive constitutional injuries,[42] and even when they do perceive injury, are more inclined toward resignation ("lumping it").[43]

What fiscal burden do § 1983 cases in fact impose on local governments? The studies of the Central District of California conclude that there is not a significant shift of public funds to § 1983 plaintiffs.[44] In 1980-81, plaintiffs achieved a successful outcome (any settlement or trial) in 50% of the § 1983 cases filed.[45] By contrast, plaintiffs in

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[39] National Center for State Courts, *State Court Caseload Statistics: Annual Report, 1976* at 169.

[40] See *id.*

[41] These findings are consistent with other studies. See *Section 1983* at 525; Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois*, 6 Loy. U. Chi. L. J. 527 (1975); Turner, *When Prisoners Sue*, 92 Harv. L. Rev. 610; Project, *Suing the Police in Federal Courts ("Project")*, 88 Yale L. J. 781 (1979).

[42] B. Curran, *The Legal Needs of the Public: A Final Report of a National Survey* 126 (1977).

[43] See Miller and Sarat, *Adversary Culture*, 15 Law & Society Rev. at 545; see also *id.* at Table 2; Galanter, *Landscape of Disputes*, 31 UCLA L. Rev. at 14; D. Trubek et al., *Civil Litigation* at S-20.

[44] *Section 1983* at 527; *Realities* at Table V.

[45] *Realities* at 2-3. For comparable percentages for the years 1975 and 1976, see *Section 1983* at 527-28.

a control group of 204 non-civil rights cases achieved success in 84% of the cases filed in the Central District in 1980-81, a finding consistent with earlier studies showing that plaintiffs in personal-injury tort cases obtain a 90% success rate.[46] Moreover, judgments and settlements in the § 1983 suits in the Central District often involved relatively minor amounts, as did fees awards.[47] These findings correspond with a Connecticut study that found infrequent and diminutive damage awards and settlements for modest sums in § 1983 cases against police officers,[48] and with data reported in a survey of local governments.[49]

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[46] *Realities* at 2 & nn. 2 & 3. See also Franklin, Chanin, & Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 Colum. L. Rev. 1, 10-11, 13-14 (1961); Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 Stan. L. Rev. 1125, 1145 n.45 (1970).

[47] *Section 1983* at 530; *Realities* at Table V. Indeed, the study of cases filed in the years 1975-1976 characterizes *Rivera v. City of Riverside* as one of only two exceptions "to the pattern of little or no financial recovery" for § 1983 plaintiffs. *Section 1983* at 529. The study concludes that, given their facts, neither case involves "excessive recovery," and neither case alters the "general impression about the [financial] impact of section 1983 litigation." *Id.* at 529-30.

[48] *Project*, 88 Yale L. J. at 813.

[49] The National Institute of Municipal Law Officers (NIMLO) sent a questionnaire to local governments asking them, among other things, to "[l]ist the amount of Section 1983 judgments and settlements against your municipality and its officials for the recent past, both in dollar amount, and expressed as a percentage of amounts originally claimed." *Municipal Liability Under 42 U.S.C. § 1983: Hearings on S. 584, S. 585, and S. 990 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 155 (Exhibit A to NIMLO's statement) (1981). Of those questionnaire responses submitted to

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In addition, empirical findings of a recent national study of local government finances belie any argument that § 1983 is the cause of a liability crisis. The Advisory Commission on Intergovernmental Relations (ACIR) concluded in a 1985 special report that "financial management problems" were the principal cause of financial emergencies for local governments from 1972 to 1983, and it anticipated no change in that situation.[50] "Civil rights" cases merited only a brief reference in the report; ACIR concluded that those cases had not "generally resulted in large financial judgments."[51] And while tort judgments against local governments, frequently predicated on recently expanded "joint and several" liability rules in some states, have led some insurance carriers to withdraw from the municipal liability market and others dramatically to increase rates, this problem has virtually nothing to do with § 1983 litigation.[52]

The reality of § 1983 litigation fundamentally contradicts the apocalyptic image petitioners and amici invoke

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Congress, 22 local governments reported no judgments or settlements in excess of one dollar, 10 others reported judgments or settlements totaling less than $10,000, and two reported judgments or settlements totaling between $25,000 and $50,000. *Id.* at 155-251. These data contradicted NIMLO's dire view of § 1983's fiscal impact on local governments. *Id.* at 49.

[50] *Local Government Financial Emergencies* at 5.

[51] ACIR, after noting the unusual situation where, apparently to settle a discrimination suit, Bridgeport, Connecticut, issued $6 million in bonds, offered the following brief caution: "While discrimination judgments may generally be of a magnitude that can be handled by local governments, there may be governments unable to cope financially with such awards." *Id.* at 5-6.

[52] *See N. Y. Times*, Sept. 30, 1985, at 13.

in their briefs.[53] This Court should not overturn *Hensley* and impose a rule of strict or mechanical proportionality between fee and damage awards on the basis of erroneous assumptions that § 1983 litigation has inundated federal courts or weakened local governments.

II. THE LEGISLATIVE HISTORY OF § 1988 DEMONSTRATES THAT CONGRESS CORRECTLY UNDERSTOOD THE NATURE OF § 1983 LITIGATION, INCLUDING THE NEED IN SOME CASES FOR AWARDS OF COUNSEL FEES THAT ARE DISPROPORTIONATE TO THE AMOUNT OF DAMAGES RECOVERED BY PLAINTIFFS

The Court in prior cases has thoroughly reviewed the legislative history of § 1988. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Blum v. Stenson*, 104 S. Ct. 1541 (1984); *Webb v. Board of Education*, 105 S. Ct. 1923 (1985). This history shows that Congress, in the wake of this Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), (1) reviewed the evidence on the effectiveness of private enforcement of civil rights laws, and (2) found the need to narrow the significant disparity in legal representation and resources between opposing parties in civil rights cases,[54] particularly where defendants are governments and public officials with "substantial resources available to them through

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[53] Indeed, as counsel for petitioners said in 1984 to the District Judge, "the City of Riverside hasn't paid a penny other than the deductible and that was years ago." (J.A. 241).

[54] See, e.g., *The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 834-35 (1973) (testimony of Dennis M. Flannery); *Awarding of Attorneys' Fees, Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 128 (1975) (testimony of Charles R. Halpern); *id.* at 79 (testimony of Charles A. Hobbs).

funds in the common treasury, including the taxes paid by the plaintiffs themselves." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976) ("House Report").[55]

Petitioners and amici concede that Congress enacted § 1988 to assure persons with civil rights grievances effective access to the judicial process by providing for awards of attorneys' fees "'Which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.'" *Hensley*, 461 U.S. at 430 n.4, quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976) ("Senate Report"). Cf. House Report at 9. (See, e.g., P.Br. at 9; S.G.Br. at 9). But, having made this concession, they then attempt to transform congressional concern for "windfalls" into a requirement of proportionality between fees and damages. Not only do petitioners and amici fail to offer support in the legislative history for this rewriting of § 1988, but they ignore congressional findings and choices inconsistent with their efforts to legislate strict proportionality through this case.

A. Finding That the Private Market for Legal Services Did Not Insure Adequate Enforcement of the Civil Rights Laws, Congress Determined That Attorneys for Prevailing Plaintiffs Should Be Compensated for All Time Reasonably Expended on Such Cases

In evaluating the evidence before it, Congress concluded — contrary to the assumption of the Solicitor General in the present case — that the "workings of the pri-

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[55] See also *Hutto v. Finney*, 437 U.S. 678, 694 (1978) ("'The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities,'" quoting House Report at 7).

vate market for legal services" (S.G.Br. at 13)[56] did not provide the legal representation and resources necessary to narrow the economic gap between civil rights plaintiffs, on the one hand, and government and corporate defendants, on the other. Congress made three principal findings about the private market's failure to provide legal services sufficient to insure protection of civil and constitutional rights:

—First, Congress found that civil rights plaintiffs could not afford to hire lawyers at the rates set by the private market. House Report at 1. See also Senate Report at 2.

—Second, Congress found that private lawyers were not willing to donate their time[57] but, on the contrary, "were refusing to take certain types of civil rights cases

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[56] The Solicitor General argues that the contingent fee market for personal injury suits should govern and limit § 1988 fee awards for § 1983 cases resulting "only" in damage awards. This argument not only ignores legislative history but misuses authority. In urging reliance on the contingent fee market for personal injury suits, the Solicitor General quotes the statement in *Blum* v. *Stenson*, 104 S. Ct. at 1547 n.11, that "the rates charged in private representations may afford relevant comparisons." See S.G.Br. at 19. But the Solicitor General neglects to quote the immediately preceding sentence in *Blum*: "Nevertheless, . . . the critical inquiry in determining reasonableness is now generally recognized as the appropriate *hourly* rate." *Id.* (emphasis added). Moreover, the Solicitor General ignores this Court's recognition in *Blum* that Congress "directed that attorney's fees [under § 1988] be calculated according to standards currently in use under other fee-shifting statutes," particularly " 'other types of equally complex Federal litigation, such as antitrust cases . . .' " *Id.*, quoting Senate Report at 6.

[57] Nor does the profession require lawyers to donate time. See Rule 6.1, ABA Model Rules of Professional Conduct (adopted Aug. 2, 1983) ("[a] lawyer *should* render public interest legal service" (emphasis added)).

because the civil rights bar, already short of resources, could not afford to do so." House Report at 2.

—Third, Congress found that the contingent fee system that provided access to the courts for most victims of serious personal injuries did not work for the victims of serious civil rights violations.[58] Recognizing that private attorneys are not often lured by the prospect of recovering a percentage of a small and uncertain monetary judgment in exchange for devoting hundreds or thousands of hours to a case over a period of many years,[59] Congress confronted the reality of the market failure:

> "[W]hile damages are theoretically available under the statutes covered by [§ 1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and neces-

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[58] See, e.g., 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy).

[59] Ignoring this congressional finding, the Solicitor General contends that "[t]he prospect of recovering $11,000 for representing respondents in their suit (assuming a contingency rate of 33%) is likely to attract a substantial number of attorneys." S.G.Br. at 22-23. In findings of fact that the Solicitor General does not contest (see *id.* at 12-13), the District Court found that, between August 1975 and November 1980, plaintiffs' counsel devoted a total of 1,946.75 hours to this case, and that this amount of time was reasonable and reflected sound legal judgment under the circumstances. (J.A. 189-90). Plaintiffs' counsel have not yet received any fees for this work. Thus, it appears to be the view of the Solicitor General that the prospect of working nearly 2,000 hours at a rate of $5.65 an hour, which will be paid (if at all) not less than ten years after the work began, is "likely to attract a substantial number of attorneys" to handle such cases. (S.G.Br. at 23).

sary if Federal civil and constitutional rights are to be adequately protected." House Report at 8.[60]

In enacting § 1988, Congress thus determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff, . . . [and] that it would be better to have more vigorous enforcement of civil rights laws than would result if plaintiffs were left to finance their own cases." *Hensley*, 461 U.S. at 444 n.4 (Brennan, J., concurring in part and dissenting in part).[61] To effectuate this goal, Congress designed a statute that would assure compensation of plaintiffs' attorneys " 'for all time reasonably expended on a matter.' " Senate Report at 6, quoting *Davis v. County of Los Angeles*, 8 E.P.D. ¶9444, at 5049 (C.D. Cal. 1974).

B. Congress Recognized and Intended That the Amount of Fees Awarded to Plaintiffs' Attorneys in Some Cases Would Be Disproportionate to the Amount of Damages Recovered by the Plaintiffs

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[60] Empirical studies uniformly support this congressional finding regarding the unavailability or severely limited nature of damage awards in civil rights litigation. See, e.g., *Section 1983*, 67 Cornell L. Rev. at 530; *Realities* at Table V; *Project*, 88 Yale L.J. at 813.

[61] Contrary to the statement in Justice Rehnquist's in chambers opinion in this case, Congress did indeed "intend . . . by § 1988 to authorize a prevailing plaintiff to obtain more generous court-ordered attorney's fees from a defendant than the plantiff's attorney might himself have fairly charged to the plaintiff in the absence of a fee-shifting statute." *City of Riverside v. Rivera*, 106 S. Ct. at 8. The legislative history reveals that Congress enacted § 1988 *because* the private market did not provide sufficiently "generous" fees to assure an adequate level of law enforcement. See 122 Cong. Rec. 31832 (1976) (remarks of Sen. Hathaway) ("[i]n the typical case arising under these civil rights laws, the citizen who must enforce the provisions through the courts has little or no money with which to hire a lawyer, and there is often no damage claim from which an attorney could draw his fee").

In designing § 1988, Congress understood and accepted that reasonable attorney's fees sometimes would be disproportionate to the amount of damages recovered by plaintiffs under § 1983 and other civil rights statutes. This would have to be so if, as Congress intended, "neither the mere recovery of damages" nor the fact that "only injunctive relief is sought" should preclude the award of fees. See, e.g., House Report at 8-9.

Moreover, as the Court noted in *Hensley*, Congress intended that fee awards under § 1988 would be computed in accordance with the standards of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which were "correctly applied" in three cases cited in the Senate Report: *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975); and *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978). *Hensley*, 461 U.S. at 429-31 & n.4, quoting Senate Report at 6. According to the cited opinions, the plaintiffs in none of these cases recovered any monetary damages, but the attorneys in each of these cases were awarded substantial fees. The plaintiffs in *Davis* and *Swann* obtained only injunctive relief, but the courts made fee awards to plaintiffs' counsel of $60,000 in *Davis*, 8 E.P.D. at 5048, and $179,000 in *Swann*, 66 F.R.D. at 486. The plaintiffs in *Stanford Daily* obtained neither injunctive relief nor damages, but only a declaratory judgment that their constitutional rights had been violated. 64 F.R.D. at 681. The court awarded $47,500 in fees to their attorneys. *Id.* at 688.[62]

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[62] Thus, if respondents in the present case had sought and obtained only declaratory relief, their attorneys unquestionably

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The issue of proportionality also was addressed by some members of Congress who expressed at length their concern that awarding fees for all time reasonably expended might result in large fee awards in relation to the amount of damages recovered. See, e.g., 122 Cong. Rec. 32392-93 (1976) (remarks of Sen. Thurmond); *id.* at 31850 (remarks of Sen. Allen); *id.* at 32394 (remarks of Sen. Helms); *id.* at 35117 (remarks of Rep. Hyde). They predicted, as petitioners and amici underscore (see, e.g., S.G.Br. at 16), that the bill would prove to be something of a "Civil Rights Attorneys Relief Act" that would guarantee large fees to attorneys. *Id.* at 31850 (Sen. Allen).

To illustrate this concern, Senator Thurmond read during the floor debate and offered for inclusion in the Congressional Record a 1972 study of attorney's fees in antitrust cases. See Note, *Attorneys' Fees in Individual and Class Action Antitrust Litigation*, 60 Cal. L. Rev. 1656 (1972), reprinted in 122 Cong. Rec. 32389 (1976). That study found, *inter alia*, that court ordered fee awards in antitrust cases ranged from 13.6% to more than 4300% of the single damages awarded. 60 Cal. L. Rev. at 1679-82.[63]

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would have been entitled to full compensation for all time reasonably spent on the case. There is no evidence that Congress intended to *reduce* fees where, as here, plaintiffs obtained not only a determination that their rights have been violated but also a judgment for damages. To the contrary, Congress specified that fees should " 'not be reduced because the rights involved may be nonpecuniary in nature.' " *Hensley*, 461 U.S. at 430 n.4, quoting Senate Report at 6.

[63] This broad range of fee awards in relation to damage awards in the antitrust cases examined by Congress is predictable given the broad range in complexity and significance of cases. Still

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Senator Thurmond warned that, under the language of the bill, fees might be similarly high in comparison to the damages awarded in civil rights cases. 122 Cong. Rec. at 32393 (1976).

With this evidence before it and despite the loud protestations of those members opposing the bill, Congress expressly adopted fee awards in antitrust cases as a model for fee awards in civil rights cases: "It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, *such as antitrust cases*[,] and not be reduced because the rights involved might be nonpecuniary in nature." Senate Report at 6 (emphasis added). See also House Report at 8-9.[64]

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it is noteworthy that this broad range did not produce unreasonably high fees in antitrust cases overall: the mean of the fee awards in these cases amounted to 176% of the single damages awarded. See 60 Cal. L. Rev. at 1670-82. A recent empirical study indicates that fee awards in antitrust cases continue to follow the same general patterns observed by Congress in 1976. See Elzinga & Wood, *The Cost of the Legal System in Private Antitrust Enforcement* (paper presented at Georgetown Law Center Conference on Private Antitrust Litigation, Nov. 8, 1985, forthcoming in S. Salop & I. White, eds., . . . (MIT Press, 1986)).

[64] The Solicitor General quotes Senator Kennedy's observation that "[w]e are not talking about the kind of attorneys' fees that were included in the antitrust bill. You do not get rich from protecting civil rights of citizens . . . . And the determination of fees is left, in any event, to the discretion of the courts." S.G.Br. at 16, quoting 122 Cong. Rec. 31851 (1976). Senator Kennedy made this comment on September 22, 1976 in response to Senator Allen's implication that civil rights attorneys, like antitrust attorneys, will collect "literally millions of dollars for their services." *Id.* at 31473; see also *id.* 31474. Senator Kennedy's comments refer to the absolute size of attorney's fees under § 1988, and not to the relationship between fee awards and damage awards in antitrust cases specifically detailed by Senator Thurmond five days later on September 27, 1976. See *id.* at 32393.

This legislative history is unambiguous: Congress wanted to assist civil rights plaintiffs by providing fees for their attorneys, and it recognized that a reasonable fee could be a large one in relation to the amount of damages.

III. THE GUIDELINES ADOPTED IN HENSLEY AND APPLIED BY THE LOWER COURTS IN THE PRESENT CASE IMPLEMENT THE INTENT OF CONGRESS AND, IN CONJUNCTION WITH OTHER SAFEGUARDS, PROTECT AGAINST AWARDS OF UNREASONABLY HIGH FEES IN CIVIL RIGHTS CASES

Petitioners and amici inaccurately describe both the lower courts' application of *Hensley's* guidelines and the existing safeguards against awards of unreasonably high attorney's fees under § 1988.[65] Contrary to their assertions, a review of the District Court's award and its exercise of discretion in arriving at the award reveals that *Hensley's* guidelines have been carefully met. Furthermore, a description of the actual world of civil rights liti-

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[65] Petitioners' and amici's statements on these points fail to account for the scope of the constitutional wrongdoing found by the District Court, and badly mischaracterize the world of civil rights lawyering. Plaintiffs' case challenged the outrageous, discriminatory behavior of numerous police officers and city officials, and implicated longstanding city policies of mistreatment of Chicanos. The Solicitor General, however, regards it as "a tort suit brought essentially for the monetary benefit of the individual plaintiffs whose rights were violated" (S.G. Br. at 12), and petitioners describe it as achieving results which "are indeed nominal. . . ." (P.Br. at 15). They also describe a world of lawyering where "there is a low risk opportunity for attorneys to greatly increase their incomes" (P.Br. at 9), a world where "lawsuits of marginal worth are being filed so as to achieve the magical goal of 'prevailing party' status under § 1988, and thus, to open to these attorneys the coffers of defendant municipalities, states and other governmental agencies." (P.Br. at 26). The facts of this case alone refute each element of petitioners' and amici's description of civil rights lawyering.

gation reveals significant safeguards — available both to courts and to defendants — that together with *Hensley* protect against unreasonably high fee awards under § 1988.

A. The District Court Properly Applied Hensley's Guidelines in Awarding Fees in this Case

In May 1983 this case was remanded "for further consideration in light of *Hensley*." On remand, the District Court held two additional hearings on the application of *Hensley* — on October 24, 1983, and on June 5, 1984. Before each hearing, the District Court reviewed both the pre-remand record and all new papers filed by plaintiffs; defendants filed no new papers and presented no new evidence. (J.A. 224, 233).[66] The District Court took a full six and one-half months between the first and second hearings to retrieve and review the entire record and to recon-

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[66] As evidence that the District Court "openly def[ied]" *Hensley* (Bliley Br. at 4), petitioners and amici offer the following statement made by the District Court at the first post-remand hearing: "I tell you now that I will not change the award. I will simply go back and be more specific about it." (See, e.g., P.Br. at 25). In quoting out of context the District Court's tentative ruling, petitioners and amici fail to note (1) that before this hearing plaintiffs had filed and the District Court had read an extensive memorandum addressing the application of *Hensley* on remand (J.A. 224); (2) that both the memorandum and plaintiffs' counsel at that same hearing had stressed, consistent with *Hensley* itself (461 U.S. at 438), that the District Court's original award might well comply with *Hensley*, but that *Hensley* required more specific ("concise but clear," *id.* at 424) findings concerning the relationship between the extent of success and the amount of the fee award (see, e.g., J.A. 228); (3) that earlier at that same hearing, the District Court had indicated, after studying *Hensley* and its own original findings, its agreement with this position (J.A. 228); and (4) that immediately after announcing its tentative ruling, the District Court indicated its intention to review the record again in light of defendants' assertions that the original award was not supported by the record. (J.A. 230-31).

sider the fee award in light of *Hensley's* standards. (J.A. 232-33). On July 26, almost two months after the second post-remand hearing, the District Court issued comprehensive Findings of Fact and Conclusions of Law, specifically considering the relationship between the fee award and the overall relief obtained, and explaining the reasons for the award concisely but clearly as required by this Court. 461 U.S. at 437.

The District Court's findings reveal conscientious application of the *Hensley* guidelines. On the basis of plaintiffs' success on the central issue of police misconduct, the District Court made the threshold determination that plaintiffs were the prevailing parties. (J.A. 191).[67] The District Court then reviewed its calculation of the base fee (the product of reasonable hours times reasonable rate),[68] and found (1) that the "amount of time expended by counsel in conducting this litigation was reasonable and reflected sound legal judgment under the circum-

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[67] Contrary to the Solicitor General's unsupported assertion (S.G.Br. at 27), this Court has held that district courts may award fees under § 1988 for state pendent claims upon which plaintiffs prevail — even when the court declines to enter judgment on the federal civil rights claims. See *Maher v. Gagne*, 448 U.S. 122, 132-33 & n.15 (1980). See also *Maine v. Thiboutot*, 448 U.S. 1, 11 & n.12 (1980) (holding that § 1988 applies to claims brought in state courts).

[68] For this reconsideration (as with the original calculation) of the base fee, plaintiffs reminded the District Court that the number of hours reflected not only the complexity of the case (see, e.g., Trial Court Docket Sheets (12 pages), Ninth Circuit Excerpts of Record at 1-12), but also the defendants' obstructive litigation tactics (see, e.g., J.A. 32-33): frivolous objections were made to obviously relevant discovery requests, legal issues were frequently misconstrued, a vexatious and meritless suit against plaintiffs and their counsel had to be removed to and then dismissed by the District Court, and trial on the merits was made necessary because, in the words of the District Court, "no adequate offer was ever suggested." (J.A. 237-38).

stances,"[69] and (2) that the hourly rate used was "typical of the prevailing market rate for similar services by lawyers of comparable skill, experience and reputation within the Central District at the time these services were performed." (J.A. 190).[70]

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[69] Petitioners list categories of work and a corresponding number of attorney-hours expended as conclusive evidence that this base fee was unreasonably high. (J.A. 12-13). Petitioners' tally of hours is often inscrutable or incorrect. More importantly, petitioners fail to offer reasons, of which they are aware, that the lower courts twice rejected each of these unsupported assertions. For example, petitioners describe Mr. Cazares' "stand-by" time as "perhaps the most outrageous entry of all. . . ." (P.Br. at 12.) As petitioners and the lower courts know, Mr. Cazares tried the lawsuit alone; Mr. Lopez was present at the trial for only a few hours of one day of the total of nine days of testimony. Little wonder that Mr. Cazares (and not Mr. Lopez) was on call, with the District Court's knowledge and without objection by petitioners' counsel, to help respond to questions posed by the jury during its deliberation. In another example, petitioners condemn the amount of time spent preparing jury instructions, informing the Court parenthetically that the instructions "were subsequently mostly discarded by the trial court. . . ." But petitioners neglect to inform the Court that, in response to this very same "factual" assertion, the District Court responded: "No, I didn't. No, I didn't. I think those were very good instructions. . . ." (J.A. 215). At a later hearing, referring to the complexity of the issues covered by the instructions, the District Court noted that "[i]t took two of my clerks one whole week to just sort out the jury instructions which I gave them with notes and comments I myself made." (J.A. 237).

[70] Because plaintiffs' lawyers were relatively young when this litigation began, petitioners claim the hourly rate was too high and the hours expended were excessive. (See, e.g., P.Br. at 20). In response to similar assertions made at the post-remand hearings, the District Court observed that "[t]here was not any possible way that [plaintiffs' attorneys] could have avoided putting in that amount of time . . ." (J.A. 238), and that "[t]hey were two of the best lawyers who have ever appeared in a civil rights case here in this courtroom, and they did an absolutely superb job." (J.A. 230). In these determinations, the District Court drew upon its considerable billing and litigation experience (see n.3 *supra*) and followed *Johnson v. Georgia Highway Express*, where the court observed that years of experience is not the most significant factor: "If a young attorney demonstrates the skill and ability, he should not be penalized for only recently being admitted to the bar." 488 F. 2d at 718-19.

The District Court then examined factors that could, under *Hensley*, lead to an adjustment of the "presumptively reasonable fee of rate times hours." *Blum v. Stenson*, 104 S. Ct. at 1550 n.18. Because "results obtained" is a particularly important factor where plaintiffs did not prevail on all claims, the District Court focused on the relationship between the relief granted and the attorney's fees awarded.[71] Carrying out inquiries required by *Hensley*, 461 U.S. at 434, the District Court found that the "claims on which plaintiffs did not prevail were closely related to the claims on which they did prevail," and that plaintiffs "achieved a level of success . . . that makes the total number of hours expended by counsel a proper basis for making the fee award." (J.A. 189-90).

Defendants requested that the fee award be reduced on the grounds that some defendants were dropped from the case prior to the end of trial.[72] The District Court based its rejection of defendants' argument on the difficulty of associating individual defendants with particular actions during a chaotic incident involving many parties,[73] and on

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[71] The District Court also expressly discussed several other *Johnson* factors, including both factors related to the determination of the base fee (time and labor required, novelty and difficulty of the questions, skill and experience of the attorneys, customary fee) and other factors bearing on adjustment of the base fee (undesirability of the case, nature and length of professional relationship with client). (J.A. 188-92).

[72] Petitioners inaccurately report that this issue "never became a matter of inquiry (or, apparently, concern) to the District Court. . . ." (P.Br. at 17).

[73] The District Court noted that even at trial "the testimony of the parties and the witnesses was often in conflict as to the role of the individual officers in the events of the evening." (J.A. 188). At the second post-remand hearing, the District Court stated that "it would have been wrong for you [plaintiffs and plaintiffs' counsel] not to join all those officers since you yourself did not know precisely who were the officers who were responsible." (J.A. 236). The Ninth Circuit did not permit

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the interrelatedness of the claims against the individual defendants and the City of Riverside. (J.A. 187-88).[74]

Having determined that the claims on which plaintiffs did not prevail were related to the claims on which they succeeded (J.A. 189), the District Court then turned to the second question posed by *Hensley*:[75] Whether the plaintiffs "achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." 461 U.S. at 434. In the course of this inquiry, the District Court addressed three major factors: the absolute value of the damage award, the amount of the fee award relative to the damage award, and the importance of the nonpecuniary effects of the case.

The District Court found that the absolute size of the damage award did not imply that plaintiffs' success was limited. In the opinion of the District Court, "the size of

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"Doe" defendants in 1976. Moreover, discovery from all named defendants, those police officers at the scene and those involved in the cover-up, was not only essential to the case against individual defendants but critical, in view of the standards of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), to building and successfully presenting a case against the City of Riverside.

[74] This case was paradigmatically, in *Hensley's* terms, a lawsuit which could not "be viewed as a series of discrete claims." 461 U.S. at 435. Not only was a common core of facts pleaded and proved, but proof of the successful claims included evidence (1) that the City of Riverside's policies and customs caused the unconstitutional deprivations, (2) that individual defendants acted with malicious intent to deprive plaintiffs of their constitutional rights — thus justifying the award of punitive damages, and (3) that defendants acted with discriminatory intent in depriving plaintiffs of their Fourteenth Amendment rights, thus leading the District Court to conclude that the unconstitutional acts were "motivated by a general hostility to the Chicano community." (J.A. 189-90).

[75] Amici wrongly declare that the District Court overlooked this question. (See EEAC Br. at 15-18; S.G.Br. at 15-18).

the jury award resulted from (a) the general reluctance of jurors to make large awards against police officers,[76] and (b) the dignified restraint which the plaintiffs exercised in describing their injuries to the jury." (J.A. 188-89).[77] Taking into consideration the size of the jury award, the District Court nonetheless found that plaintiffs' counsel achieved "excellent results" (J.A. 190) and that "the total accomplishment in this case was quite extraordinary." (J.A. 235).

In rejecting petitioners' argument that the fee award must be mechanically proportional to the damage award, the District Court properly followed *Hensley*.[78] The District Court noted several factors that legitimately contributed to the relatively large size of the fee award: the factual and legal complexity of the case (J.A. 188-89), the

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[76] At the second post-remand hearing, the District Court noted that "I have tried several civil rights violations cases in which police officers have figured and in the main they [police officers] prevailed because juries do not bring in verdicts against police officers very readily nor against cities." (J.A. 235). Empirical studies confirm the District Court's experience (see *Realities; Section 1983; Project),* and they contradict the unsupported assertions of amici. (See, e.g., Bliley Br. at 23).

[77] Appreciating plaintiffs' difficult decision to underplay this aspect of their case, the District Court earlier had observed: "[O]ne of the things I liked about the trial was it seemed to me that there was no attempt to whip this up into a major confrontation between this family, the members of this family, and the police. The feelings were high enough while it was going on. If there had been — if either counsel had misbehaved during the trial in the sense that you would have whipped up the feeling, it would have been a very bad thing for the future, for their [the plaintiffs'] future in the community and for the police." (J.A. 208).

[78] While generally leaving the District Court to determine the significance of the overall relief obtained in relation to the hours reasonably expended on the litigation, this Court expressly rejected the view that attorney's fees under § 1988 should be awarded on the basis of any mathematical proportionality test — either between issues raised and issues prevailed upon, or between relief sought and relief obtained. See *Hensley,* 461 U.S. at 436 n.11.

conflicting state of the evidence (J.A. 188), the large number of defendants involved (J.A. 188), and the undesirability of and local hostility toward the case which required plaintiffs to obtain out-of-town counsel. (J.A. 189).[79] In accordance with *Hensley*, the District Court considered the relative size of the damage award as a relevant factor in determining the significance of overall relief, and concluded that an award of fees for all hours reasonably expended was justified. (J.A. 192).

Finally, the District Court also took into account the nonpecuniary[80] results achieved by this litigation.[81] The District Court recognized that this litigation was necessary to remedy defendants' "lawless, unconstitutional conduct," which reflected not only isolated acts against particular

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[79] While these factors were reflected in the original calculation of "reasonable hours," it is appropriate to reconsider them in the context of petitioners' and amici's argument for strict proportionality. For a given damage award, a reasonable fee award in a case where these complicating factors are present may be significantly higher than a reasonable fee award in a case where such factors are absent.

[80] Petitioners and amici misapprehend Congress' conclusion that fees awarded under § 1988 should "not be reduced because the rights involved might be nonpecuniary in nature." Senate Report at 6. They convert the words "rights involved might be nonpecuniary in nature" into something like "remedy might be solely or primarily equitable." While Congress was concerned that fees in cases resulting only in equitable relief not be reduced, the legislative history reveals that Congress also understood that in our legal system the importance of the constitutional rights vindicated does not always translate into dollar recoveries of equivalent significance. See House Report at 8. See also 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy); 122 Cong. Rec. 31832 (1976) (remarks of Sen. Hathaway). The nonpecuniary nature of civil rights also led Congress to find that the contingent fee system for personal injury suits did not and could not work adequately to secure counsel for victims of civil rights violations. See Argument II *supra*.

[81] While the tendency to emphasize the dollar value of the results achieved is understandable given the cognitive prominence of hard numbers, the effort of petitioners and amici to

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individuals but "general hostility to the Chicano community in the area where the incident occurred." (J.A. 190). Moreover, at the second post-remand hearing, the District Court emphasized the deterrent value of this civil lawsuit: "The institutional behavior involved here in my opinion had to be stopped and in my opinion nothing short of having a lawsuit like this would have stopped it." (J.A. 237).[82]

In reviewing the District Court's decision, the Court of Appeals found that the "relationship [between hours expended and overall relief obtained] is precisely what the district court focused on," and that the District Court

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downgrade the nonpecuniary societal benefits achieved in this and other civil rights litigation is particularly inappropriate. For example, this Court in recent years has praised the value of § 1983 damage actions in deterring Fourth Amendment violations. See, e.g., *Segura v. United States*, 104 S. Ct. 3380, 3390 (1984). Similarly, to underscore the high degree of public and symbolic value in vindicating civil rights deprivations, this Court has recognized the existence under § 1983 of claims actionable for nominal damages without proof of actual injury. See *Carey v. Piphus*, 435 U.S. 247, 266 n.24 (1978). The availability of such actions under § 1983 reflects "the importance to organized society" that certain rights be "scrupulously observed." *Id.* at 266.

[82] While the issuance of injunctive relief often indicates important nonpecuniary results, the absence of formal equitable relief does not imply that the success of a lawsuit is completely summed up by the damage award. In addition to its findings concerning the nonpecuniary results of this litigation, the District Court observed that unconstitutional deprivations by defendants may have "warranted an injunction." (J.A. 219). Only the imprudent breadth of an order that might read "Obey the Constitution" dissuaded plaintiffs' attorneys from pursuing this relief at the close of trial. *Id.* Moreover, Congress and this Court have rejected formalistic barriers to fee awards under § 1988. See *Maher v. Gagne*, 448 U.S. at 129 ("Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.' " (quoting Senate Report at 5)).

"found a reasonable relationship between the extent of that success and the amount of the award." (J.A. 196).[83] The Court of Appeals rejected as inconsistent with congressional intent the proposition that fee awards must be mechanically proportional to damage awards, and found meritless the contention that the District Court had not reconsidered the record on remand. (J.A. 196-97). Because the District Court concisely but clearly explained proper grounds for its decision, the Court of Appeals concluded that the award of fees was well within the District Court's discretion. (J.A. 197).

In reviewing the record and in reaching this conclusion, the Court of Appeals acted consistently with this Court's recent decision in *Anderson v. City of Bessemer City,* 105 S. Ct. 1504 (1985). In *Anderson* this Court held that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 1512. Deference to the District Court's judgment reflects both the superiority of the trial judge's position to make findings and the District Court's accumulated expertise in that role. *Id.*

B. Proportionality Is Unnecessary in Light of Hensley and Other Safeguards Against Unreasonably High Fee Awards and Gouging Attorneys

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[83] In confirming the District Court's award of fees necessary to vindicate Fourth, Fifth and Fourteenth Amendment rights, the Court of Appeals fulfilled this Court's promise in *Carey v. Piphus,* 435 U.S. at 257 n.11 ("[t]he potential liability of § 1983 defendants for attorney's fees [under § 1988] provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore . . . [constitutional rights]"). See also *Maine v. Thiboutot,* 448 U.S. at 11 ("Congress viewed the fees authorized by § 1988 as 'an integral part of the remedies necessary to obtain' compliance with § 1983," quoting Senate Report at 5).

Petitioners and amici champion proportionality to change a world where existing safeguards fail to protect against unreasonably high fee awards ("windfalls") and avaricious attorneys. (See, e.g., P.Br. at 9, 26, 27). The image they construct for this Court, however, bears little resemblance to the actual litigation of civil rights cases. First, they understate the steps taken by Congress and this Court to insure that § 1988 would not become a "relief fund for lawyers." *Hensley,* 461 U.S. at 446 (Brennan, J., concurring in part and dissenting in part) (citing 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy)). Second, they ignore other existing safeguards that work in tandem with *Hensley* and that can be invoked by defendants themselves to constrain gouging and vexatious plaintiffs' lawyers.

These safeguards are substantial. First, only prevailing plaintiffs may recover fee awards; merely litigating a bona fide claim in good faith is not sufficient. *Id.,* citing House Report at 6-8. Contrary to petitioners' and amici's portrayal of § 1983 cases as "low risk," empirical studies conclude that § 1983 plaintiffs prevail far less frequently than do plaintiffs in other civil lawsuits. See Argument I *supra.* In particular, out of the seventeen § 1983 cases filed in the Central District of California in 1975 and 1976 that resulted in trials, the present case was one of only five in which plaintiffs prevailed.[84] Studies attribute this relatively poor success rate to jury bias against plaintiffs and for defendants (especially police officers) in civil rights cases and to judicial hostility to civil rights plaintiffs.[85]

Even if plaintiffs prevail, district courts have discretion to set the precise award in individual cases according

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[84] *Section 1983,* 67 Cornell L. Rev. at 527-28 & n.198.

[85] See *Project,* 88 Yale L.J. at 808-09 (studying 149 § 1983 cases against police over a nine year period in a Connecticut district court); *Section 1983,* 67 Cornell L. Rev. at 539.

to standards that were tested by courts before § 1988's passage, scrutinized by Congress to insure that competent attorneys would be attracted but not overpaid, and carefully elaborated by the Court in *Hensley* and *Blum* to achieve the delicate balance Congress sought. Moreover, Congress and the Court permit district courts to deny fees entirely in special circumstances when an award would be unjust — even if the plaintiff prevails. *Hensley*, 461 U.S. at 429, citing Senate Report at 4. Still, petitioners and amici insist that the world created by Congress and this Court in *Hensley* invites undeterrable abuse by greedy plaintiffs' attorneys. (See, e.g., P.Br. at 26-28; EEAC Br. at 21; Bliley Br. at 8).

Petitioners' and amici's speculation also ignores the existence of still other safeguards against avaricious overlitigation. Both Congress and this Court have reaffirmed that attorney's fees can be awarded against plaintiffs who litigate frivolous or vexatious claims. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. at 416-17; *Hughes v. Rowe*, 449 U.S. 5, 14-16 (1980) (per curiam); House Report at 6-7 (1976). Moreover, the 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure makes severe sanctions (including attorney's fees) more readily available for precisely the abuses petitioners and amici describe as currently undeterrable. See Rule 11, Fed. R. Civ. P.[86]

Finally, petitioners and amici conveniently ignore the availability of Rule 68 as a safeguard against mercenary

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[86] A recent empirical study finds that, in less than two years after Rule 11 was amended, at least 159 opinions were published concerning sanctions, with attorney's fees granted as sanctions in 65 of those cases. Kassin, *An Empirical Study of Sanctions Under Rule 11* (forthcoming Stan. L. Rev. (1986)). The study finds, on the basis of an extensive questionnaire and survey of 259 federal district judges, that there is a heightened awareness of Rule 11's new requirements. *Id.* See also Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985).

attorneys in cases governed by § 1988. Rule 68 provides that if a timely pretrial offer of settlement is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." In *Marek v. Chesney,* 105 S. Ct. 3012 (1985), this Court held that the term "costs" in Rule 68 includes attorney's fees awardable under § 1988: "Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer." *Id.* at 3017. Since Rule 68 places no limits on the number of settlement offers that can be made at any time more than 10 days before the trial begins, defendants already have available to them a highly refined and effective means of deterring the greedy lawyers petitioners and amici so fear.

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

TABLE 1

§ 1983 FILINGS IN THE
CENTRAL DISTRICT OF CALIFORNIA

Year	Nonprisoner § 1983 Cases Filed Per Judgeship	Total § 1983 Cases Filed Per Judgeship	Total § 1983 Cases As Percentage of All Civil Cases Filed
1975[1]	8.75	16.5	5.56%[2]
1976[3]	8.5	13.9	5.56%
1980-1981[4]	10.6	14.2	3.80%

Sources: Eisenberg & Schwab, *The Realities of Constitutional Tort Litigation* at 16, 19 (1986) (study presented at Association of American Law Schools 1986 Annual Conference) (copy lodged with the Clerk of the Court); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 531 (1982).

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[1] Figures are for the calendar year 1975.

[2] This figure is a combined percentage for the years 1975 and 1976.

[3] Figures are for the calendar year 1976.

[4] Figures are for the fiscal year 1980-1981, and include cases combining § 1983 and Title VII claims as well as "pure" § 1983 cases.

TABLE 2

CHARACTERISTICS OF
NONPRISONER § 1983 CASES IN THE
CENTRAL DISTRICT OF CALIFORNIA

Year	Number of Cases Filed	Cases Resulting in Trials	Cases with Answers Filed	Cases with Hearings Held	Cases with Depos. Taken	Cases with Interrogs. Served	Median Time to Disposition
1975[1]	140	7	76	39	30	51	7.0 mo
1976[2]	136	10	69	37	26	41	10.0 mo.
1980-1981[3]	178	18	115	101	101	57	11.6 mo.

Sources: Eisenberg & Schwab, *The Realities of Constitutional Tort Litigation* at Tables II and III (1986) (study presented at Association of American Law Schools 1986 Annual Conference) (copy lodged with the Clerk of the Court); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 526-27 (1982).

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[1] Figures are for the calendar year 1975.

[2] Figures are for the calendar year 1976.

[3] Figures are for the fiscal year 1980-1981, and include cases combining § 1983 and Title VII claims as well as "pure" § 1983 cases.